IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 433 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

V R DHANANAI

Versus

STATE OF GUJARAT

Appearance:

MR JF SHAH for Petitioner

None present for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 18/11/97

C.A.V. JUDGEMENT

1. The petitioner, a Medical Officer, of Health Department of Government of Gujarat, filed this Special Civil Application and prayer has been made for declaration that the petitioner had lawfully withdrawn his resignation dated 17th November, 1978. Further prayer has been made for declaration that the petitioner is in continuous service as if the letter of resignation dated 17th November, 1978 was never tendered and the

order dated 18th April, 1979 appointing the petitioner as the new entrant is illegal. Further prayer has been made for declaring the order dated 28-1-1980, terminating the petitioner's services as illegal and void.

2. The facts of the case, in brief, are that the petitioner was temporarily appointed to the Gazetted post of Medical Officer in the Gujarat Public Health Service Class-II vide order dated 15th December, 1970. Thereafter, the petitioner was selected for this post by the Gujarat Public Service Commission and he was given the regular appointment under the order dated 18th January, 1972.

3. On 17th November, 1978, the petitioner submitted a letter of resignation from the services to the Director of Health and Medical Services. No communication has been received by the petitioner for the acceptance of the said resignation. On account of the change in his family circumstances, the petitioner withdrew his letter of resignation by a letter dated 24th January, 1979 addressed to the Hon'ble Minister for Health. The petitioner has approached to the authorities and ultimately, the petitioner was appointed on temporary basis as Medical Officer as a fresh entrant under the order dated 18th April, 1979. After the aforesaid order, the petitioner protested against his appointment as a fresh entrant and reference has been made to his representation dated 26th April, 1979. Then he sent another representation which was followed by subsequent reminders. In those representations, the petitioner had made a request for condonation of break in his service, but that request of the petitioner has been turned down by the respondents vide letter dated 7th January, 1980, a copy of which is submitted on record of this Sp. C.A. as annexure `I'. The petitioner made further representation. However, under the order dated 28th January, 1980, the services of the petitioner were terminated. Hence, this Special Civil Application.

4. This Court has granted the interim relief in favour of the petitioner and the petitioner is continuing in service. This petition has been contested by the respondents by filing reply to the Sp. C.A..

5. The learned counsel for the petitioner contended that the action of the respondents not to condone the break in service of the petitioner is wholly arbitrary and unjustified. It is a case where the petitioner's resignation was not accepted, and as such, he has all the right to withdraw the same before its acceptance. It has

next been contended that a hostile discrimination has been made by the respondents in the matter of condonation of break in service. Reference in this respect has been made by the petitioner to the cases of two Doctors namely, Shri R.T. Goswami and Shri D.M. Pancholi. In the cases of these persons, the break in their service after resignation and reappointment has been condoned. In support of his contention, the counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of Rajkumar vs. Union of India reported in AIR 1969 SC 180 and on the decision of this Court in Sp. C.A. No.155/72 decided on 8th March, 1972 and another decision of this Court in the case of Hukumat Rai vs. State reported in 1982 (1) GLR 641.

6. In the special civil application, the petitioner has not given any details of this ground now raised by the counsel for the petitioner of discrimination nor he has amended the special civil application incorporating this ground. The ground of discrimination has been taken on the fact that two doctors namely, Dr. Pancholi and Dr. Goswami though they have also submitted their resignation but in their cases they were permitted to withdraw their resignation and further the break in their services is ordered to be counted. So far as Dr. Pancholi is concerned, it appears that the reference to his case has been made by the petitioner somewhere prior to filing of the reply to the special civil application by the respondents. In reply, the respondents have explained his case but so far as Dr. Goswami his concerned, his case is raised during the course of arguments of this special civil application. However, the respondents have given a detailed explanation to the case of Dr. Goswami. Lastly, the learned counsel for the petitioner contended that the order dated 28th January, 1980 under which his services were terminated is wholly arbitrary and unjustified.

7. Nobody is present on behalf of the respondents. However, the respondents filed reply to the Sp. C.A. and then filed a further additional reply to explain the cases of two Doctors on the basis of which the plea of discrimination is raised by the petitioner.

8. I have given my thoughtful consideration to the submissions made by the learned counsel for the petitioner and pleadings of the parties.

9. Under annexure `G', the order dated 18th April, 1979, the petitioner has been given the appointment on

deputation to Jilla Panchayat, Amreli, until further orders on the terms and conditions as enclosed to the said order. As per the condition No.1, this appointment was purely on temporary basis for a period not exceeding one year or till the candidate selected by the G.P.S.C. is made available, whichever is earlier. So the appointment of the petitioner was purely a temporary appointment for one year or till the candidate selected by the G.P.S.C. is made available, whichever is earlier. The services of the petitioner came to be terminated under the order dated 28th January, 1980 on the ground that the candidate selected by the G.P.S.C. has been made available.

10. The petitioner tendered his resignation vide his letter dated 17th November, 1978 and informed the Director of Health and Medical Services that he wanted to resign voluntarily from Government services w.e.f. 18th November, 1978 after office hours. As the petitioner wanted to relieve himself from services immediately, he deposited an amount of Rs.1379-70 in the Amreli Branch of the State Bank of India and enclosed challan thereof with the resignation letter. The prayer has also been made by the petitioner for acceptance of his resignation letter forthwith. Admittedly, the petitioner handed over the charge of his post on 18th November, 1978. On 24th January, 1979, the petitioner made a request for withdrawal of his resignation and this application has admittedly been addressed to the Hon'ble Minister for Health with a copy thereto to the Director of Health and Medical Services. The request of the petitioner for withdrawal of his letter of resignation was not accepted by the Government, but the Government has given out that in case the petitioner if so desires, may be given a temporary appointment. The letter of the Government dated 16th April, 1979 is on the record filed by the respondents along with their reply affidavit. In this letter it has clearly been mentioned that the petitioner's request for withdrawal of his resignation has not been accepted.

11. Under the order dated 18th April, 1979, the petitioner was given purely urgent temporary appointment. The petitioner in the special civil application has come up with a case that he has accepted this appointment order dated 18th April, 1979 under protest, but I do not find any material on record in support of this plea. On the contrary, in his letter dated 18th April, 1979, the petitioner has stated that he is accepting the appointment as per the order of Government and the petitioner has unconditionally accepted the order under

which he was given purely temporary and adhoc appointment. Otherwise also, this plea is totally incorrect as in the petitioner's own application dated 18th April, 1979, that was the first opportunity where the petitioner should have raised the protest no such protest has been made. The fact is that the petitioner has accepted the conditional appointment. The plea of the petitioner that he has accepted the appointment under protest is otherwise also not acceptable on other grounds. In case the temporary and adhoc appointment was not acceptable to the petitioner then he should not have accepted it, but the very fact that he has accepted the same goes to show that he had no objection thereto. The request of the petitioner for grant of permission to him for withdrawal of his resignation has specifically been turned down by the Government and it has been given out that if he so desire he may be given a temporary and adhoc appointment. In the presence of these facts now the say of the petitioner that he has accepted the appointment order of 18th April, 1979, under protest is without any basis whatsoever as well as a manufactured plea. The representation dated 26th April, 1979 is on record of this special civil application as annexure `G'. This representation was submitted by the petitioner after more than eight days of the order dated 18-4-1979 of the respondent of appointment and about five days after the date he joined the post in pursuance of the said order, which is nothing but only an after thought act of his. Moreover, the substance of the representation dated 26th April, 1979 is that after accepting this appointment the petitioner has prayed for regularisation of his break in service by sanctioning the leave due. So the petitioner has prayed by this application-cum-representation for the condonation of his break in service. The condonation of break in service would have arisen only when the petitioner is permitted by the respondents to withdraw his resignation. It is not the case here. The petitioner, as stated earlier, and it is also clear from the Government letter dated 16th April, 1979, his request for withdrawal of his resignation was turned down but he was only given the offer for fresh temporary and adhoc appointment. By this application-cum-representation, the petitioner has made an attempt to create some confusion and got an order or relief indirectly, which has specifically been rejected by the respondents. In case this application would have been accepted by the respondents then the petitioner could have stated that now he is in continuous service. This conduct of the petitioner deserves to be deprecated. The attempt of the petitioner to get his resignation withdrawn by this application is unjustified, unreasonable and unfair. Be

that as it may, now I may first deal with the contention of the counsel for the petitioner that the action of the respondents not to allow the petitioner to withdrew his resignation is illegal.

12. The facts relevant on this question on which there is no dispute are that the petitioner wanted to get out of Government services forthwith i.e. on 17th November, 1979 itself. He submitted his resignation along with a cheque of Rs.1379-70. This amount is deposited in lieu of notice pay. From the very next day, he admittedly stopped to come on his duty. He has not waited for acceptance or deemed acceptance of his resignation by the respondents. So whatever had to be done on his part he had completed and got himself relieved from the services. The learned counsel for the petitioner contended that as per the terms of appointment order dated 15th December, 1970, the petitioner has to give three months' notice in case where he desires to leave the service and as the three months' notice was not given, the resignation which has been submitted by him was not valid and legal. I fail to find any justification in this contention of the learned counsel for the petitioner. That defence could have been open to the respondents and not to the petitioner. This condition was for the benefit of the respondents and the petitioner cannot take the benefit of this condition. The matter would have been different where the respondents have declined to accept the resignation on the condition that three months' notice has not been given. The condition which has been incorporated in the appointment order for the benefit of the respondents certainly could have been waived by them and they have all the right to waive the same. The petitioner cannot take benefits of his own acts or omission.

13. Another contention of the learned counsel in this respect is that the resignation of the petitioner has not been accepted, and as such, he has all the right to withdraw the same. The right of withdrawal of resignation would have come to an end only after the acceptance of resignation but so long as the resignation has not been accepted, the petitioner has all the right to withdraw the resignation, and as such, the respondents have committed serious illegality in not permitting the petitioner to withdraw his resignation. In support of his contention, the counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in the case of Raj kumar vs. Union of India (supra). Another decision has been referred of this Court given in special civil application No.155/72. This Court has

decided that special civil application on 8-3-1972 and the decision of the Hon'ble Supreme Court is of the year 1969. This Court has decided aforesaid special civil application relying on the decision of the Hon'ble Supreme Court aforesaid. The Hon'ble Supreme Court in the case of Raj kumar vs. Union of India (supra) has enunciated the law on the subject in the following terms:

"Termination of employment by order passed by the Government does not become effective until the order is intimated to the employee. But where a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which letter of resignation is accepted by the appropriate authority and in the conditions of his service to the contrary, it will not be open to the public servant to withdrew his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the rules governing the acceptance, the public servant concerned has locus paenitenties but not thereafter."

It is not in dispute that specifically the order of acceptance of resignation of the petitioner was not passed by the respondents but those two decisions on which the learned counsel for the petitioner has placed reliance are of little help to the petitioner in this case. The Bombay Civil Services Rules, 1959 were amended by the Bombay Civil Services (Gujarat Third Amendment), 1974. The notification of the amendment of the Rules, 1959 was published on 10th October, 1974 in the Gazette. Under this amendment, Rule 33-A has been inserted which deals with the question of resignation of employees/ officers from the Government services.

14. Rule 33-A of the Rules, 1959, provides that a Government servant may at any time resign from the services of the State by giving a notice of one month in writing to the appointing authority. For the temporary servant who has put in service of less than one year, the period of notice is provided to be of one week. This Rule further provides that nothing contained therein shall effect the provisions of any special contract of service or bond entered into by the Government servant with the Government, or the provisions of any special rules, if any, applicable to him, in respect of the period of notice to be given for resignation from service or payment of any sum by the Government servant, to the Government for premature resignation by him.

15. Sub-rule (2) of Rule 33-A of the Rules aforesaid provides that the resignation tendered by a Government servant shall be effective from the date on which it is accepted by the appointing authority, but if it is not accepted before the expiry of the period of notice for resignation to be given by such servant under sub-rule (1) it shall be deemed to have become effective on the date of expiry of such period, unless the Government servant is informed, before such date, that his resignation has been rejected and of the reasons of such rejection. This rule further provides that on what counts, the resignation of a Government servant normally should be rejected.

16. Sub-rule (4) of Rule 33-A of Rules, 1959, lays down that where a Government servant remains absent from duty before his resignation has become effective or if his resignation has been rejected without prior grant of leave for such absence, it shall be lawful for the competent authority to treat his absence as leave without pay and to take disciplinary action against him for unauthorised absence from duty.

17. Sub-rule (5) of Rule 33-A of Rules, 1959 is also relevant. This sub-rule says that any notice of resignation from service shall not be permitted to be withdrawn after the resignation has become effective, except of exceptional ground or in public interest.

18. Another contention raised by the learned counsel for the petitioner is that as per the terms of appointment as contained in the order dated 15th December, 1970, three months' notice is required to be given, and as such, it was not a valid resignation and there is no question of any acceptance thereof. Reliance in this respect has been placed on sub-clause (b) of sub-rule (1) of Rule-33A of the Rules, 1959. This contention raised by the petitioner is nothing but only a dishonest plea. Sub-clause (b) of sub-rule (1) of Rule 33-A no doubt carved out an exception to the sub-rule (1) clause (a) in respect of notice period but the question is whether the petitioner can take the benefit of this provision. It is clear that three months' notice condition was for the respondents and it is settled law that even a statutory provision can be waived by a party which has nothing to do with the public policy or otherwise affect the public at large. The proviso as contained in clause (b) of sub-rule (1) of Rule 33-A is not of that character or nature and certainly the respondents have all the discretion to waive the

requirement of giving the three months' notice or notice pay. The petitioner otherwise also cannot be permitted to take the benefit of his own wrong or omission. The petitioner wanted to relieve himself from services immediately and that's why he deposited one month's salary with the respondent. As observed earlier, on this count a grievance from the side of the respondents may have some merits or justification but not by the petitioner. In fact the petitioner had played fraud upon the Government by depositing only one month's salary in lieu of notice and he now wanted to take the benefit of his own fraud in his favour. At the most in such a case, the respondents could have further asked from the petitioner two months' salary but it will not give any benefit to the petitioner nor it can be read for the benefit of the petitioner. If such a reading is given and theory of waiver is not made applicable in the present case then certainly dishonest persons will take the benefits of their own creations, wrongs and omissions.

19. The contention of the learned counsel for the petitioner that the resignation was not accepted, and as such, the petitioner has all the right to withdraw the same is completely answered by this legal fiction created under the Rules framed under Article 309 of the Constitution. Rule 33-A is a statutory provision and sub-rule (2) thereof creates a legal fiction that in case the resignation is not accepted before the expiry of the period of notice for resignation to be given by such servant under sub-rule (1) it shall be deemed to have become effective on the date of the expiry of such period, unless the Government servant is informed, before such date, that his resignation has been rejected and of the reasons for such rejection.

20. The petitioner submitted his resignation on 17th November, 1978 and one month period expired on 16th December, 1978. It is not the case of the petitioner that his resignation has been rejected during this period. So the resignation submitted by the petitioner dated 17th November, 1978 became effective by the legal fiction as created under Rule 33-A of the Rules, 1959 with effect from 16th December, 1978. The decisions of the Hon'ble Supreme Court as well as of this Court are clearly distinguishable as those decisions have been given earlier to the insertion of Rule 33-A in the Rules, 1959. After acceptance of the resignation the petitioner has no right whatsoever to make a request for withdrawal thereof. This right is completely taken away under the statutory provisions of sub-rule (5) of Rule 33-A of the

Rules, 1959. However, power has been given to the respondent-Government to permit the withdrawal of notice of resignation after it has become effective, but that power is only available on exceptional ground or in public interest. The petitioner has made an application for withdrawal of his notice of resignation after the resignation has become effective under Rule 33-A of Rules, 1959 and in the given facts of the case it cannot be said that he is able to make out some exceptional ground or withdrawal of resignation would have been in the public interest. The petitioner has tendered his resignation from the government service for starting a private dispensary at Jetpur Dist. Rajkot. He started to run his dispensary. However, it appears that after lapse of 2 months, he experienced that it was uneconomic to run a private dispensary and therefore he submitted an application on 24th January, 1979 for permitting him to withdraw his resignation and to reinstate him in service by condoning the break that has occurred. The fact that the petitioner failed in his project of private dispensary may not be taken to be exceptional circumstances or a fact in the public interest for taking back the petitioner in service. From the facts which have come on the record, it is a case where the petitioner has been extended some benefit may be at the instance of the then Hon'ble Minister for Health for withdrawal of his resignation. The Hon'ble Minister was not at all the person concerned to whom the application should have been submitted. The very fact that the petitioner submitted his application to the then Hon'ble Minister for Health gives out that he may have some chances of favour from his side but after considering the application of the petitioner, the Government has not found it to be a case of exceptional ground or in the public interest to permit him to withdraw his resignation. After that decision though no further favour is required to be given but the very fact that the petitioner has been offered fresh temporary appointment is a strong circumstance to draw an inference therefrom that this appointment may be as a result of favour extended to him by the then Hon'ble Minister for Health. There is yet another circumstance which support my this view. As per the case of the respondents on the day on which the petitioner was given temporary and adhoc appointment number of candidates were there on waiting list prepared by the G.P.S.C..

21. Now I may deal with the ancillary contention raised by the learned counsel for the petitioner of discrimination in the matter of grant of permission for withdrawal of resignation to two other doctors. The

petitioner has cited the case of two Doctors one is Dr. Pancholi and another is Dr. Goswami. Sub-rule (5) of Rule 33-A nodoubt empowers the respondent-State to grant the permission to an employee/officer for withdrawal of his resignation after it has become effective but as stated earlier, this power is not without any control or guidelines. Exercise of this power is permissible only in case where the respondent-State is satisfied with and found that it is a case of exceptional ground or the withdrawal of resignation is in the public interest. Dr. Pancholi and Dr. Goswami are two doctors who have been permitted to withdraw their resignation and further their break in service was ordered to be regularised. Dr. Pancholi's has been dealt with by the respondent in the main reply to the special civil application. The respondents have come up with a case that the case of the petitioner is not comparable to the case of Dr. Pancholi on any ground whatsoever. Dr. Pancholi is possessing the qualification of M.D.. He was working after his selection by the G.P.S.C. as Physician Class I, Div. II at Civil Hospital, Gandhinagar with effect from 5-5-1975. He resigned from the services on 1-9-1977 giving one month's notice and left the services on 1-10-1977. On 23rd February, 1978, Dr. Pancholi had applied to the Government to allow him to withdraw his resignation and looking to the peculiar circumstances of the case and in view of the acute shortage of M.D. physicians in the Medical Department, the Government accepted his request. The respondents have come up with a case in the reply, which is uncontroverted, that the petitioner is a M.B.B.S. doctor and in the year 1979-80, number of M.B.B.S. doctors were available for Class-II post of Medical Officers. It has further been sated that number of qualified doctors selected by the G.P.S.C. are on the waiting list. So from the averments made in the reply to the special civil application which are uncontroverted by the petitioner, the case of Dr. Pancholi is clearly distinguishable. It was taken to be a case of exceptional ground or may be a case of public interest to permit him to withdraw his resignation. There was dearth of physicians, and as such, it is a case where it can be stated that the grant of permission to Dr. Pancholi for withdrawal of his resignation is otherwise in the public interest and case of the petitioner is not comparable.

22. So far as Dr. Goswami is concerned, his case is also distinguishable. Dr. Goswami has resigned from the post for the reasons of higher study in the U.S.A. He went to States but he did not keep well and in addition he being the only son in the family had to return to India because his father had attack of duo-denalcer and

his mother had attack of hysteria. He submitted his application for withdrawal of his resignation and taking it to be an exceptional ground that has been granted. The exercise of powers under sub-rule (5) of Rule 33-A of the Rules, 1959 depend on facts of each case and exercise of that powers in the case of two Doctors may not be said to be arbitrary or perverse. In the case of the petitioner he wanted to start his own clinic and he in fact started his clinic, and as such, it cannot be said that the decision not to grant him permission to withdrew his resignation can be said to be perverse or arbitrary or the decision which could not have been taken in the facts of the present case. I consider it to be fruitful to make here the reference of decision of the Hon'ble Supreme Court in the case of State of Haryana & Ors. vs. Ram Kumar Mann reported in 1997 (3) SCC 321. That was the case where four Government servants have resigned from the Government services for contesting the election. It appears that after they lost the election they have approached to the Government for grant of permission for withdrawal of their resignation and it appears that in three cases the permission has been granted for withdrawal of resignation whereas in the fourth case the same has not been granted. The decision has been challenged by filing the special civil application in the Punjab & Haryana High court and the aforesaid action of the respondent-State was held to be violative of Article 14. The matter was taken up by the State of Haryana before the Hon'ble Supreme Court. The Hon'ble Supreme Court observed that from the date the resignation was accepted by the Government, the relationship of employer and employee ceased and thereafter the employee has no right, whatsoever, either to claim the post or a right to withdraw his resignation which had already become effective by acceptance. It may be that the Government for their own reasons, had given permission in similar case, to some of the employees to withdraw their resignation and has appointed them. The Hon'ble Supreme Court has held that the doctrine of discrimination is founded upon existence of an enforceable right. The petitioner was the person concerned who approached to the Court with the grievance that he has been discriminated and denied equality as some similarly situated persons had been given the same relief. But Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The Court has further held that the employee/officer has no right whatsoever and cannot be given the relief wrongly given to others i.e. the benefit of withdrawal of resignation. In that case it was not found that there was invidious

discrimination. The Courts cannot allow a wrong to perpetrate, and an example has been given out that, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service, can a similarly circumstanced person claim equity under Article 14 of the Constitution for reinstatement ? The question whether he can be given that benefit, the answer is given "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. The right must be founded upon enforceable right entitling him to the equal treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.

23. Though in the present case, prima-facie I found that the order made in the case of two doctors are made on their own facts and may not be incorrect but even if it is taken to be a wrong decision in their case by the respondent, it cannot be said to be a case of invidious discrimination which attract Article 14 of the Constitution. Otherwise also, as stated earlier, in fact the petitioner has not pleaded this ground in the petition but still I have considered this ground.

24. Taking into consideration the totality of the facts of this case, the prayer of the petitioner for condonation of break in service is otherwise not tenable leaving apart the other points as stated in the earlier part of the judgment.

25. Next now comes the contention of the counsel for the petitioner challenging the validity of the order of the respondent dated 28th January, 1980 under which the petitioner's service were terminated. The services of the petitioner were terminated on the ground that the candidate duly selected by the G.P.S.C. was made available.

26. The appointment order of the petitioner dated 18th April, 1979 has to be briefly referred. This appointment was given to the petitioner on the terms and conditions as specified therein. First condition of the appointment was that it is purely on temporary basis for a period not exceeding one year or till a candidate selected by Gujarat Public Service Commission is made available, whichever is earlier. He will be relieved without notice as soon as the candidate selected by G.P.S.C. is made available. There is another condition

that this appointment will not entitle a candidate for the purpose of appointment on long term basis. Then comes the condition that the candidate should apply to the Gujarat Public Service Commission when the posts are advertised by that body in future and in case a candidate fails to apply or fails to appear for interview or if he is not selected by the G.P.S.C., his services will be liable to be terminated forthwith. The candidate shall be treated as a regular appointee on selection by G.P.S.C.. Further the candidate has to be give an undertaking as under:

"I understand that my employment under the Government of Gujarat as Medical Officer, Gujarat Public Health Services, Class-II is purely temporary and that my services may be dispensed with at any time, without assigning any reason and without any notice and I accept the employment on this basis."

Then there are two other important conditions which are to be noticed. This appointment is purely on temporary basis and liable to be terminated at any time without any notice and without assigning any reason.

27. From the aforesaid terms it is clear that the petitioner was given the purely urgent temporary appointment for a period of one year or till the regular selected candidate is made available, whichever is earlier. This appointment does not confer any right to the petitioner to continue on the post and the same is liable to be terminated without any notice or without assigning any reason.

28. The learned counsel for the petitioner has not disputed that the termination of the services of the petitioner had become necessary as the candidate selected by the G.P.S.C is available. In the case of State of Gujarat & Anr. vs. P.J. Kampavat reported in 1992 (3) SCC 226, their Lordships of the Hon'ble Supreme Court held that the persons appointed on specific condition that their services will be purely temporary and liable to be terminated forthwith without any notice cannot seek any protection. Reference may have to another decision of the Hon'ble Supreme court in the case of Dr. Arundhatti Ajit Pargaonkar vs. State of Maharashtra reported in JT 1994 (5) SC 378 and in the case of Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. vs. Devendrakumar Jain & Ors. reported in JT 1995 (1) SC 198 wherein it is held that a temporary appointee does not become permanent unless it acquired that capacity by force of any rule or is declared as permanent. No notice or opportunity of

hearing is required to be given to such person before terminating his services. So leaving apart the specific terms and conditions of appointment of the petitioner otherwise also in view of the aforesaid legal position he is not required to be heard or given a notice before terminating his services.

29. In the case of Smt. P.K. Narayanan & Ors. vs. State of Kerala & Ors. reported in 1994 (Supp) SCC 212 their Lordships of the Hon'ble Supreme Court held that the termination of services of temporary and adhoc appointees on availability of the selected persons from Public Service Commission is not illegal. It has further been held that such appointees have no right whatsoever.

30. Reference may have to another decision of the Hon'ble Supreme Court in the case of K. Sureshkumar vs. State of Kerala reported in 1988 (2) SLR 773 wherein the Court has considered the case of termination of services of the temporary employees appointed subject to regular recruitment through the Public Service Commission. The services of those temporary employees have been terminated on preparation of the select list of the selected candidates by the Public Commission though the appointments have not been made. The order of termination has been challenged by those persons but the Hon'ble Supreme Court has declined to interfere in the matter.

31. In the case of State of Rajasthan vs. Rajendrakumar Rawat reported in 1989 (Supp) (2) SCC 268, the matter has again come up for consideration before the Hon'ble Supreme Court of termination of services of temporary employees who have been appointed with a condition of termination of their services on availability of the regularly selected candidates through Public Service Commission. The termination of services of those persons was held to be justified by the Hon'ble Supreme Court.

32. Reference may also have to the decision of the Hon'ble Supreme Court in the case of Surendrakumar Gyani vs. State of Rajasthan reported in AIR 1993 SC 115 wherein it has been held that the termination of service of temporary employees on the availability of the candidates recruited through the Public Service Commission is valid in law and was not vitiated by any error of law.

33. There is another case which I consider it to be appropriate to refer here in the case of Patel Ashok

Kumar B. vs. State of Gujarat & Ors. reported in 1996 (2) GLR 535. That was the matter of termination of services of persons who were appointed on adhoc basis subject to the condition of termination of services on the availability of the selected candidates. This Court has held that the persons appointed on adhoc basis on condition that their services would continue only till the candidates selected by the G.P.S.C. are made available, cannot claim right to continue on the post when the candidate selected by the G.P.S.C. are made available.

34. So it is no more res integra that the persons who were appointed on temporary and adhoc basis on condition of termination of their services on availability of the selected candidates have no right to continue in the service. The termination of their service does not give any enforceable right to them and no exception can be taken to the order of their termination. They have to make a room for the selected candidates.

35. In view of the terms of the order of appointment of the petitioner as contained in the order dated 18th April, 1979 as well as the settled position of law, I do not find any illegality or perversity in the order dated 28th January, 1980 under which the services of the petitioner were terminated. None of the legal and fundamental right of the petitioner are infringed and he has no enforceable right in the matter.

36. The counsel for the petitioner in the end contended that the petitioner is working for all these years as Medical Officer as this Court has protected him. Now the total working of the petitioner even under the order dated 18th April, 1979 is of 18 years and as such the direction may be given to the respondent to continue and regularise his services.

37. There is no dispute on the fact that while admitting this petition, this Court has granted the interim relief against the termination of services of the petitioner only on the ground stated in annexure `K' i.e. the order of termination. The working of the petitioner is certainly of about 18 years by now and out of which more than 17 years under the interim order of this Court. The counsel for the petitioner contended that now if the petitioner is directed to go home then certainly it is harsh not only to him but to his family also as now he will not be able to get any job. The learned counsel for the petitioner summarizes that a sympathetic and compassionate view may be taken and the respondents may

be directed to regularise the petitioner's services and his break in services may be condoned for the purpose of pension and other retirement benefits.

38. I have given my thoughtful consideration to the submission aforesaid made by the learned counsel for the petitioner. It is true that the petitioner is working for all these years but it is equally true that the petitioner is working under this Court's order. It is not in dispute that the petitioner stopped to attend his duties from 18th November, 1978.

39. Sub-rule (4) of Rule 33-A of the Rules, 1959 is relevant for the purpose of deciding this contention of the counsel for the petitioner and I consider it to be appropriate to reproduce the same, which reads as under:

> (4) Where a Government servant remains absent from duty before his resignation has become effective or if his resignation has been rejected without prior grant of leave for such absence, it shall be lawful for the competent authority to treat his absence as leave without pay and to take disciplinary action against him for unauthorised absence from duty.

This sub-rule (4) of Rule 33-A of the Rules, 1959 postulates that the Government servant cannot remain absent from duty before his resignation has become effective or if his resignation has been rejected without prior grant of leave for such absence. It shall be lawful for the competent authority to treat his absence as leave without pay and to take disciplinary action against him for unauthorised absence from duty.

40. The mere submission of resignation as it is apparent from sub-rule (2) of Rule-33A of Rules, 1959 does not stand accepted. The resignation tendered by the Government servant shall be effective from the date on which it is accepted or as per the deeming clause on the date of expiry of the notice period. The petitioner could not have remained absent earlier to 18th December, 1978 but he has taken law in his own hands and he left the services from 18th November, 1978. This absence of the petitioner was otherwise also a misconduct. The petitioner was a Doctor and as such he should have acted strictly as per the requirement of Rules. This conduct of the petitioner is serious and on the basis of which the relief as sought to be prayed for by the counsel for the petitioner cannot be accepted.

41. The interim order passed in proceedings under Article 226 of the Constitution by this Court is subject to outcome of final adjudication. If the petitioner is not successful in the final decision, the interim order would stand set aside. So the continuation of the petitioner on the post by interim order of this Court does not create any right nor does any right accrue to the petitioner for regularisation on that post. Reference may have to the decision of the Hon'ble Supreme Court in the case of N. Mohanan vs. State of Kerala & Ors. reported in 1997 (2) SCC 556. The petitioner is not continuing in the service on his own right under the appointment order but he is continuing for all these years in the service because of the interim relief granted in this special civil application by this Court in his favour.

42. In the case of Committee of Management vs. Sree Kumar Tiwari reported in 1997 (4) SCC 388, the Hon'ble Supreme Court has considered the matter with reference to the eligibility of candidate for regularisation who has completed the period of eligibility by working under the Court's interim relief. The respondent, therein, came to be appointed as adhoc teacher on 1-1-1986 against a short term vacancy. His appointment came to be terminated with effect from 30-6-1988. The respondent challenged the aforesaid order in a writ petition in the High Court of Allahabad. Pending writ petition, an interim order of stay was granted by the learned Single Judge. However, on merits the special civil application was dismissed and stay order was vacated. The respondent, therein, approached to the Division Bench and the Division Bench has granted the interim relief in his favour. Pending the appeal before the Division Bench, the services of the respondent therein came to be regularised and taking into consideration this fact, the Division Bench has decided the appeal that he would be entitled to continue in service. The Committee has taken up the matter before the Hon'ble Supreme Court. There contention was raised that section 33 (B) of the U.P. Secondary Education Services Commission (Removal of difficulties) Order, 1981 has no application to the case of the respondent for the reasons that the temporary service of an adhoc employee should continue in a vacancy in accordance with section 2 of the aforesaid Act and he has been continuously serving the institution from the date of such appointment upto the date of commencement of the Third Removal of Difficulties Order. Section 33-B of the said Act postulates among others, regularisation of a candidate who was appointed by promotion or by direct recruitment in the certificate of teaching grade before 13-5-1989

against a short-term vacancy in accordance with para 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, and such vacancy was subsequently converted into a substantive vacancy. In that case, the incumbent of the post was retired from service on 30-6-1988. So the temporary vacancy was deemed to have been converted into a substantive vacancy on 30-6-1988 but in that case services of the respondent came to be terminated w.e.f. 30-6-1988. He had obtained the stay order and continued to be in service, it was not by virtue of his own right under an order of appointment but under the Court's order. In these facts, the Court has not taken the respondent to be eligible. Working on the post under the Court's interim order, the status of petitioner cannot be better than that of an adhoc or temporary appointee. On dismissal of the special civil application, the order of interim relief is merged in the final order and it comes to an end. It is a case where the petitioner worked for all these years but under the order of interim relief and it does not confer any right to him to continue in the service. If such a contention is accepted then though on merits the Court may not find any case in favour of the petitioner but still because the interim relief has been granted in his favour he will get all the benefits. So in those facts, the special civil application on merits will not have any consequential effect. The interim orders cannot be read and given effect to in the manner and in the way in which it is sought to be contended by the learned counsel for the petitioner. However, as the petitioner has worked under the interim order at the most whatever amount which has been paid to him cannot be recoverable but he cannot be considered to be in the regular employment or a legal appointee to the post and to get all the benefits for which otherwise he was not found entitled on merits. The order of termination of the services of the petitioner in the earlier part of this judgment is held to be valid and in case the last contention of the learned counsel for the petitioner is accepted then what this Court will do that though the order of termination of the services of the petitioner is a valid order but he will be ordered to be continue in service. That contradictory order otherwise also cannot be passed by this Court sitting under Article 226 of the Constitution. Not only that but this Court will perpetuate an illegality by continuing the person who otherwise has no right to the post whatsoever. In the result, this contention of the counsel for the petitioner is of no substance and the same is rejected.

43. In the result, this special civil application

fails and the same is dismissed with costs. The quantum of costs is assessed to Rs.1000/-. Interim relief granted by this Court stands vacated.

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zgs/-